Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALFRED DIGIACOMO,

Petitioner,

v.

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether ERISA's fee-shifting provision requires the award of attorney's fees to a prevailing party or, alternatively, whether any single one of the five factors to be considered in making the award should be preclusive?

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INTRODUCTION

This case concerns a split in the circuit courts regarding the application of ERISA's fee-shifting provision. This Court has held that ERISA authorizes the award of attorney's fees "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims." Consistently with that purpose, some circuit courts have applied the fee shifting rationale used by this Court in civil rights cases, holding that a prevailing party should ordinarily recover his attorney's fees. Other circuits, however, including the Third, have refused to award attorney's fees to prevailing parties unless the benefit denial was in bad faith, e.g., have denied fees where the issue involved was "close and difficult".

The "bad faith" rationale makes it almost impossible for beneficiaries to find attorneys willing to represent them on a contingency basis to challenge any but the most frivolous of benefit denials, thereby defeating the purpose of ERISA's fee-shifting provision.

OPINION BELOW

After the district court dismissed DiGiacomo's action on the merits in an unpublished opinion, the Court of Appeals for the Third Circuit ("Third Circuit") reversed the dismissal and ruled for DiGiacomo on the merits of his claim. The Third Circuit's opinion is reported at 420 F.3d 220. A petition for certiorari from that opinion is presently pending. (No. 05-841) Subsequently, in a separate unpublished opinion which is the subject of this Petition, the Third Circuit denied DiGiacomo's Motion for Attorney's Fees. App. A.

STATEMENT OF JURISDICTION

The Third Circuit issued its Judgment denying DiGiacomo's application for attorney's fees on November 15, 2005. App. A. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(g)(1), 29 U.S.C. § 1132(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*

STATEMENT OF THE CASE

This Petition seeks a review of a decision by the Third Circuit which denied attorney's fees to Petitioner after ruling in his favor on the merits of his claim for greater pension benefits.

DiGiacomo applied to the Third Circuit for "$38,920.00 in attorney's fees for services rendered in successfully bringing an appeal from the District Court's dismissal of the action."[1] After holding that DiGiacomo was a "prevailing

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1. As noted by the Third Circuit, Defendants opposed the application for fees only in response to the Court's request. ("We requested that the Fund respond to DiGiacomo's application for attorney's fees"). Inasmuch as a fee request under a fee-shifting statute is an adversarial proceeding, the Court's request for the Fund's opposition is no different from a court's interposing *sua sponte* a waived affirmative defense, a practice held improper by this Court. *See Arizona v. California*, 530 U.S. 392, 412-13 (2000) ("trial courts must be cautious" not to "erod[e] the principle of party presentation so basic to our system of adjudication").

party", the Court held that he was not entitled to attorney's fees under ERISA § 1132(g)(1), because that section "does not automatically mandate an award to a prevailing party".

The Third Circuit held that the statutory issue involved was a "close and difficult one", and that the "divergence of opinion", which divided the Courts of Appeals and the panel itself, made it "clear to us that there was no culpability or bad faith on the part of the Fund in partially denying DiGiacomo's claim for accrued benefits." The Court held that, "[i]n these circumstances, we find no basis for a discretionary award of attorney's fees to the prevailing party."

The material facts underlying DiGiacomo's being a "prevailing party" in this litigation are uncontested. From 1960 to 1971, DiGiacomo earned a total of 10.5 years of benefit service under the Teamsters Pension Plan of Philadelphia and Vicinity. For the next five years he worked in employment not covered by the Plan, but he returned to covered employment in 1978, earning an additional 18 years of credited service. When he applied for a pension in the year 2000, he was credited only with his post-1978 employment on the grounds that, pursuant to the express provisions of the Plan, the benefit service he earned between 1960 and 1971 was forfeited due to his break in service from 1972 through 1977.

In his action, DiGiacomo argued that in calculating his accrued benefit, ERISA § 204 trumped the provisions of the Plan and required the Plan to credit all his service, regardless of his break in service. After the district court dismissed the action, the Third Circuit ruled in favor of DiGiacomo. Although the issue raised by DiGiacomo was one of first impression in the Third Circuit, the Court noted that "outside

this Circuit two of our sister Court of Appeals have already specifically examined and analyzed the issue, reaching contrary conclusions". 420 F.3d at 225. The two cases were *McDonald v. NYSA-ILA Pension Plan*, 320 F.3d 151 (2d Cir. 2003), and *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994). After reviewing the two cases and noting that "this question is a close and difficult one", the Third Circuit ruled in DiGiacomo's favor, adopting the Second Circuit's analysis in *McDonald*.

REASONS FOR GRANTING THE PETITION

The Third Circuit denied fees to DiGiacomo because the statutory issue involved was a "close and difficult one", so that the Fund's benefit denial was not "culpable" or in "bad faith". Allowing a disqualifying rule like this turns Congress' purpose in authorizing attorney's fees in ERISA cases on its head. ERISA Section 502(g)(1) provides in pertinent part:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

As this Court has found, "ERISA authorizes the award of attorney's fees":

> in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights . . .

Massachusetts Mutual v. Russell, 473 U.S. 134, 147, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985).

DiGiacomo possessed a small benefit claim - less than $500 per month - based on a broad statutory right which affected many other participants. He sued to enforce that right and won. If his claim, as the Third Circuit has held, presented a statutory question that was "close and difficult", causing the likelihood of success to be small, there was more, rather than less, reason to award attorney's fees to his counsel, who was willing to undertake such risky representation.

Close to 30 years ago, the United States Court of Appeals for the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), developed a five-factor standard for the courts to use in determining whether to award attorney's fees in ERISA cases. That test, which has been adopted by all circuit courts,[2] examines:

> (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees; (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar

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2. *Gray v. New England Telephone*, 792 F.2d 251 (1st Cir. 1986); *Miles v. NYS Teamsters Conf. Pension Plan*, 698 F.2d 593, 602 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 672-73 (3d Cir. 1983); *Reinking v. Philadelphia American Life Ins Co.*, 910 F.2d 1210, 1217-18 (4th Cir. 1990); *Iron Workers Local No 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985); *Leigh v. Engle*, 727 F.2d 113, 139 n.39 (7th Cir. 1984); *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980); *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983); and *Eddy v. Colonial Life Ins Co.*, 59 F.3d 201, 210 (D.C. Cir. 1995).

> circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions.

587 F.2d at 465.

The reasons for granting the Petition are, first, that there is a conflict among the circuits in applying the five-factor standard, and, second, that the standard conflicts with the purpose of ERISA's fee shifting provision, as found by *Russell*.

I. THERE IS A CONFLICT AMONG THE CIRCUITS IN APPLYING THE FIVE-FACTOR STANDARD TO A PREVAILING PARTY

A. The Third Circuit Is Alone In Holding That Bad Faith Is A Sine Qua Non For Fee Awards

The Third Circuit applied the five-part standard as follows:

> Even assuming, *arguendo*, without deciding, that the remaining [three] factors weigh in favor of an award of attorney's fees, we believe that the first and fifth . . . factors so strongly militate against such an award as to control our determination. Accordingly, we deny DiGiacomo's application for attorney's fees.

The Third Circuit's decision looked solely to the first and fifth factors in denying the fee award. With respect to the fifth factor ("the relative merits of the parties' positions"), it cannot plausibly have been in the defendants' favor since

the plaintiff won the case and secured all the relief that he sought. *See Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 1991 U.S. Dist. LEXIS 17175 (N.D. Ill. 1991) (finding fifth factor "neutral" where both positions had merit, but recognizing that "an ward of fees can be justified even when the relative merits of the parties' positions does not tip decidedly in favor of the party requesting fees"); *Oregon Laborers-Employers Trust Funds v. Pacific Fence and Wire Co.*, 1990 U.S. Dist. LEXIS 7278, *6 (D. Or. 1990) ("In cases where the losing party simply failed to prove its case, this factor has been found to be neutral").

With respect to the first factor ("the degree of the offending parties' culpability or bad faith"), the Third Circuit's own precedents show that "culpability" can arise if the party's conduct "involve[d] the breach of a legal duty." *McPherson v. Employees' Pension Plan of America Re-Insurance Co.*, 33 F.3d 253, 257 (3d Cir. 1994). In this instance, the Third Circuit held that the forfeiture of Mr. DiGiacomo's benefits violates ERISA's break-in-service provisions. While this may not establish "culpability" by itself, it certainly does not move the factor so "strongly" in the defendants' column as to preclude discretion to make an attorney's fee award.

Unlike the Third Circuit, most circuits hold that the *Eaves* standard merely offers a list of five factors for the district court to examine. The presence or absence of any one factor is not determinative, nor is it required that a prevailing party satisfy a majority of the factors. *See, e.g., Gard v. Blankenburg*, 33 Fed. Appx. 722, 731 (6th Cir. 2002) ("These considerations represent a flexible approach, and no single factor is dispositive"); *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1345 (11th Cir. 2001) ("No one of these factors

is necessarily decisive"); *Riley v. Administrator of the Supersaver 401k Capital Accumulation Plan*, 209 F.3d 780, 782 (5th Cir. 2000) (abuse of discretion for district court "to endow the single factor of culpability or bad faith with exclusive powers of control"; court should "consider and explicate" each factor "and do so without giving predominance or preclusive effect to any one of them"); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1209 n.17 (10th Cir. 1992) ("no single factor should be held dispositive"); *Carpenters Southern California Administrative Corp v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984) (no factor "is necessarily decisive"); *Gray v. New England Tel & Tel Co., supra*, 792 F.2d 251, 258 (1st Cir. 1986) (no factor "should be dispositive").

The Third Circuit's decision in *DiGiacomo* represents a marked departure from these precedents and even from the Third Circuit's own precedents that each factor must be balanced and that no one is determinative. *See Fielas v. Thompson Printing Co.*, 363 F.3d 259, 275 (3d Cir. 2004) (the factors "are not requirements in the sense that a party must demonstrate all of them in order to warrant an award of attorneys fees"); *Tomasko v. Weinstock*, 2003 U.S. App. LEXIS 23536, *12 (3d Cir. 2003) (vacating and remanding denial of fees where court failed to articulate an analysis of all five factors); *Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999, 1011 (3d Cir. 1992) ("each factor is "to be balanced and considered"); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1278 (3d Cir. 1992) (remanding and ordering district court to "reconsider each factor in balance and relationship to the others").

A court must examine all of the *Eaves* factors in balance and in light of the statutory purpose as described in *Russell*

before determining whether a fee award is proper. *See, e.g., Smith v. Contini*, 2003 U.S. Dist. LEXIS 14336, *4-5 (D.N.J. 2003) (granting attorneys' fees where only three factors weigh in favor of a fee award and two factors are neutral). The Third Circuit's newfound approach would, inconsistently with all the other circuits, make the first and the fifth factors preclusive (even though the fifth factor, the "relative merits," should have been at worst neutral under any examination). No other circuit has made the first factor preclusive by itself, denying fees when the denial of benefits is ultimately determined to be unlawful, but the court's decision was "close and difficult".

B. There Is A Split Among The Circuits As To Whether There Is A Presumption In Favor Of Awarding Fees To A Prevailing Party

In the application of the five-factor standard, there is a split among the Circuit Courts as to whether there should be a presumption in favor of awarding fees to a prevailing party. The Eighth Circuit has adopted that presumption by analogy to the fee-shifting presumption in the civil rights statutes, as interpreted in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). Under this presumption, a prevailing plaintiff should be awarded attorneys' fees. *Hensley* at p. 1937.

Although it has not expressly adopted the *Hensley* analogy, the Ninth Circuit applies the five-factor standard along with the presumption that a prevailing plaintiff in an ERISA action should ordinarily recover attorney's fees. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984).

The Seventh Circuit has held that ERISA does not create a presumption for the award of attorney's fees to prevailing plaintiffs. However, it has adopted the prevailing party presumption used in the Equal Access to Justice Act, which provides that attorney's fees should be awarded to the prevailing party unless such special circumstances would render such an award unjust. *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984).

The D.C. Circuit has adopted the five-part test while, at the same time, explicitly rejecting the *Hensley* presumption that an award to a prevailing plaintiff is appropriate absent exceptional circumstances. *Eddy v. Colonial Life Insurance Company of America*, 59 F.3d 201, 203 (D.C. Cir. 1995). The First, Third, Fifth and Sixth Circuits have also expressly rejected the *Hensley* analogy between the fee-shifting provisions under ERISA and the civil rights statutes[3] and, instead, apply the five-part test on a case-by-case basis to determine whether attorney's fees should be awarded.

The Second, Fourth, Tenth and Eleventh Circuits have not expressly rejected the *Hensley* analogy, but have held that the determination as to whether or not attorney's fees should be granted pursuant to the five-part test is a discretionary decision to be made by the court.[4]

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3. *See Gray v. New Englard Tel & Tel Co., supra*, 792 F.2d at 258-59; *Ellison v. Shenango Inc. Pension Board*, 956 F.2d 1268, 1274-75 (3d Cir. 1992); *Iron Workers Local No 272 v. Bowen, supra*, 624 F.2d at 1265-66; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991).

4. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987); *Quesinberry v. Life Ins Co.*, 987 F.2d 1017, 1030 (4th Cir. 1993) (en banc); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 108 (10th Cir. 1983); *Nachwalter v. Christie*, 805 F.2d 956, 961 (11th Cir. 1986).

The rationale for not following the presumption in favor of awarding fees established in *Hensley* is, as enunciated in *Eddy v. Colonial Life, supra*, 59 F.3d at 205, that: "The interests furthered by ERISA differ substantially from those furthered by the civil rights statutes . . . Civil rights are constitutionally based; ERISA rights are statutory. In addition, ERISA protects economic interests, while the civil rights statutes advance dignitary as well as economic interests."

This distinction should not have been drawn, both in light of Congress' purposes and because most civil rights actions seek to establish economic interests, too, whether in hiring, promotion, equal pay, etc. Treating employee benefits - such as pension, health and disability insurance benefits - as less important than the economic interests involved in civil rights is inconsistent with Congress' clear direction. As the Romans knew so well, "*primum edere, deinde philosophari*".

ERISA's preamble announces Congress' intent to provide participants with "ready access to the federal courts" to enable them to protect their rights to benefits. 29 U.S.C. § 1001(b). Courts have explained that the purpose of ERISA § 502(g)'s provision is "to secure effective access to federal courts." *Smith v. CMTA-IAM Pension Trust, supra*, 746 F.2d at 589.

The Third Circuit's position is untenable because it goes to the other extreme and effectively creates a presumption *against* awarding fees in "close and difficult" cases. In addition to Congress' clear intent, there are substantial policy reasons against creating such a presumption in cases that vindicate ERISA's "economic" interests, particularly when the claim of the individual plaintiff is relatively small. No individual ERISA beneficiary will rationally seek to

vindicate his economic interests if the cost of doing so exceeds the benefit. (In the case at bar, attorney's fees incurred so far in the district court and court of appeals exceed $60,000, for a $ 500/month benefit). If attorney's fees are not to be awarded, the costs of vindicating those interests invariably will exceed the benefit.

It makes little sense for Congress to provide a panoply of statutory rights which employees are unable to enforce because no attorney will rationally accept a case that is "close and difficult." Denying fees to a prevailing plaintiff solely because the legal issue was a "close and difficult one" means that, in order to qualify for fees, a beneficiary must prevail on an issue that is neither "close" nor "difficult", i.e., where a benefit denial is frivolous or close to frivolous. With all due respect, that could not have been Congress' intent in adopting the ERISA fee-shifting provision that omits a "prevailing party" requirement.

It also means that, by denying fees when the legal issue involved is a difficult one, some circuits, including the Third Circuit, choose to discourage beneficiaries from vindicating their statutory rights ,"thereby risking underenforcement of beneficiaries' statutory rights." *Russell*, 473 U.S. at 147. That choice is clearly contrary to the purpose of ERISA's fee-shifting provision, namely the elimination of "a barrier to maintenance of suits for small claims". *Id.*

II. EAVES' FIVE-PART TEST IS INCONSISTENT WITH THE PURPOSE OF ERISA'S FEE-SHIFTING PROVISION ENUNCIATED IN *RUSSELL*

The *Eaves* court did not explain how it derived its five-factor standard, which sprung fully formed like Minerva from Jupiter's knee, without any reference to ERISA's purpose. Moreover, it has not been re-examined in light of *Russell*, which was decided eight years after *Eaves*. That standard, however, is inconsistent with the purpose of ERISA's fee-shifting provision, as enunciated in *Russell*.

Unlike numerous other statutes that provide for fee-shifting only to a "prevailing party", ERISA provides a district court with greater discretion by providing that "the court in its discretion may allow a reasonable attorney's fee and costs of action *to either party*." (Emphasis added) Thus, under ERISA a party need not be "prevailing" to qualify for fees.

Some courts have ignored the difference in language and limited fee awards to the "prevailing party". *See, e.g., Griggs v. E.I. Dupont De Nemours & Co.*, 385 F.3d 440, 453 (4th Cir. 2004) ("Although the statute is silent in this regard, we have interpreted section 1132 as authorizing an award of attorney's fees only to a prevailing party"). Other courts, noting the difference in ERISA's fee shifting provision, have held that, at least theoretically, a party need not be a "prevailing party" to qualify for fees. *See, e.g., Miles v. NYS Teamsters Pension Plan, supra*, 698 F.2d at 602 ("Although success on the merits is not, in theory, indispensable to an award of attorney's fees under 29 U.S.C. § 1132(g)(1), rarely will a losing party in an action such as this be entitled to fees").

In fact, however, thirty years after ERISA's effective date, *no court* has awarded fees to a non-prevailing party, while many courts have denied fees to a "prevailing party", as the Third Circuit has done in the case at bar. In short, some courts have interpreted the fact that Congress did not require an ERISA beneficiary to be "prevailing" to qualify for fees, as providing them with discretion to *deny* fees to a prevailing party, rather than as an invitation to *award* fees to a non-prevailing party under certain circumstances.[5]

As this Court has held with regard to fee-shifting statutes generally, "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." *Independent Federation Of Flight Attendants v. Zipes*, 491 U.S. 754, 758, 109 S. Ct. 2732, 105 L. Ed. 2d 639 (1989). Those "limits" are to be found in "'the large objectives' of the relevant Act." *Id.* at 759, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). For example, in light of the purposes of the Civil Rights Act of 1964, "a prevailing plaintiff should 'ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Independent Federation*, 491 U.S. at 759.

The Supreme Court has validated the use of "several nonexclusive factors" in determining whether to award attorneys' fees so long as the factors are faithful to the

5. Courts have noted, however, that ERISA does not require "prevailing party" status for purposes of applying the "catalyst theory", which this Court held inapplicable to "prevailing party" fee shifting statutes in *Buckhannon v. West Virginia HHS Dept.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). *See, e.g., Adams v. Bowater*, 313 F.3d 611, 615 (1st Cir. 2002).

statutory purpose. *See Fogerty v. Fantasy, Inc*, 510 U.S. 517, 534 n.19, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). In the current application of the five-part standard by several of the circuits, the statutory purpose of ERISA, to protect employee rights and secure effective access to federal courts, is not being fulfilled. The only way to assure that ERISA plaintiffs can enforce their rights under ERISA is to require a mandatory award of attorneys' fees for prevailing plaintiffs. *See* Ann C. Bertino, "The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases", 42 Catholic University Law Review 871 (1992).

In sum, the proper standard must be the *Hensley* standard, whereby a prevailing party is always entitled to fees. A court's discretion under ERISA's fee shifting provision to "allow a reasonable attorney's fee and costs of action to either party", must be construed to mean that it is permissible under certain circumstances for a court to award fees to a losing beneficiary, e.g., in a "close and difficult case", or to a prevailing defendant, e.g., where the beneficiary's claim was frivolous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED NOVEMBER 15, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3510

ALFRED DIGIACOMO,

Appellant,

v.

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY,

Appellee.

Before: SCIRICA, *Chief Judge*, ALITO* and GARTH, *Circuit Judges*

(Opinion Filed: November 15, 2005)

OPINION OF THE COURT DENYING APPELLANT'S APPLICATION FOR ATTORNEY'S FEES

* Judge Alito did not participate in the conference resulting in this Opinion.

Appendix

GARTH, *Circuit Judge*:

Alfred DiGiacomo brought this action against the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the "Fund") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, alleging that the Fund incorrectly computed his pension benefits by refusing to credit pre-ERISA service time accrued prior to a break-in-service. The District Court granted the Fund's motion to dismiss on the ground that ERISA did not preclude the Fund from relying on certain break-in-service provisions in its governing pension plan. Those provisions explicitly permitted the Fund to exclude DiGiacomo's pre-ERISA service time accrued prior to his break-in-service. A divided panel of this Court reversed, holding that Section 204 of ERISA, 29 U.S.C. § 1054, trumped the plan's break-in-service provisions and thus required the Fund to aggregate DiGiacomo's pre-break and post-break service time in calculating his accrued benefit. *See Digiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220 (3d Cir.2005).[1]

We revisit this matter only to decide whether DiGiacomo, as the prevailing party, is entitled to attorney's fees under ERISA, 29 U.S.C. § 1132(g)(1).[2] That provision provides

1. The Court denied the Fund's Petition for Rehearing En Banc on October 5, 2005.

2. DiGiacomo's counsel seeks $38,920.00 in attorney's fees for services rendered in successfully bringing an appeal from the District Court's dismissal of the action. We requested that the Fund respond

(Cont'd)

that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (emphasis added); *see also Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir.1983) (noting that 29 U.S.C. § 1132(g)(1) "does not automatically mandate an award to a prevailing party") (citation omitted). We have set forth the following five factors to guide the exercise of such discretion:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' position.

Ursic, 719 F.2d at 673.

We conclude that application of the *Ursic* factors does not support DiGiacomo's request for an award of attorney's fees. Our determination is particularly informed by the first and fifth *Ursic* factors. As we noted earlier in these

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(Cont'd)

to DiGiacomo's application for attorney's fees. On November 8, 2005, the Fund filed Appellees' Response in Opposition to Appellant's Application for Attorney's Fees, arguing that DiGiacomo has failed to satisfy the guidelines set forth in *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir.1983) for an award of attorney's fees.

proceedings, the question presented by this appeal — "whether, for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break-in-service" — is a "close and difficult one." *Digiacomo*, 420 F.3d at 225. The question has divided the Courts of Appeals. *Compare McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 153 (2d Cir.2003) *with Jones v. UOP*, 16 F.3d 141, 143 (7th Cir.1994) and *Redmond v. Burlington N. R.R. Co. Pension Plan*, 821 F.2d 461, 466-67 (8th Cir.1987). And it has led to a division within our Court. *See Digiacomo*, 420 F.3d at 228-231 (Alito, J., dissenting).

In view of this divergence of opinion regarding the proper construction of ERISA's break-in-service rules, it is clear to us that there was no culpability or bad faith on the part of the Fund in partially denying DiGiacomo's claim for accrued benefits. It is equally clear to us that the Fund's legal position has significant merit. Leaving aside the supporting opinions from the federal appellate courts, the Fund prevailed before the Arbitrator and the District Court in the proceedings below. In addition, the Fund reasonably relied on past decisions from our Court in enforcing its pre-ERISA break-in-service provisions. *See Haas & Cass v. Boeing Co.*, Civ. A. No. 90-7414, 1992 WL 221335, at *4-*7 (E.D.Pa. Sept. 4, 1992), *aff'd without opinion*, 993 F.2d 877 (3d Cir.1993); *see also Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir.1985). In these circumstances, we find no basis for a discretionary award of attorney's fees to the prevailing party.

Appendix

Even assuming, without deciding, that the remaining *Ursic* factors weigh in favor of an award of attorney's fees, we believe that the first and fifth *Ursic* factors so strongly militate against such an award as to control our determination. Accordingly, we will deny DiGiacomo's application for attorney's fees.

NO. 05-1033

Supreme Court, U.S.
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MAR 15 2006
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In The
Supreme Court of the United States

ALFRED DIGIACOMO,

Petitioner,

v.

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether ERISA Section 502(g)(1) mandates that the award of attorneys' fees be given to the prevailing party, where the plain language of the fee shifting provision permits an award to either party at the discretion of the court?

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INTRODUCTION

ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1) permits a court the discretion to award reasonable attorneys' fees and costs to either party in actions involving participants, beneficiaries or fiduciaries under that sub-chapter of ERISA. The provision permits the Court the discretion of awarding attorneys' fees to a prevailing party, but does not make it mandatory. This can be compared to ERISA Section 502(g)(2) in which Congress required the award of mandatory attorneys' fees to a plan which successfully enforces ERISA, Section 515, 29 U.S.C. § 1145. Petitioner's statement that participants and beneficiaries have difficulty obtaining representation on a contingency fee basis, without the presumption of attorneys' fees is pure speculation. The fact is that the pool of attorneys knowledgeable in ERISA is limited, with many representing ERISA funds or employers. Petitioner has produced no evidence that participants and beneficiaries in those minority jurisdictions with a presumption of attorneys' fees to the prevailing plaintiff have any greater access to legal representation.

This Court has found such a presumption of attorneys' fees in Civil Rights cases. However, there is also a greater public interest in civil rights cases as they often involve the protection of constitutional rights. There is no "private attorney general" doctrine to invoke in an ERISA case. ERISA only protects the economic interest of the individual participants and beneficiaries by not allowing employers to apply arbitrary rules in the

administration of a pension promised to its employees. Although those interests are important, they do not rise to the level of a clearly defined constitutional right.

The majority of circuits, including the Third Circuit, apply a five-factor test in determining whether to award attorneys' fees and costs in such cases. Petitioner's assertion that the courts use bad faith as a watershed factor is misguided. Bad faith is only one of the five factors that are considered in determining whether to grant attorneys' fees. In DiGiacomo, the Third Circuit did not exclusively give weight to a lack of bad faith, also finding that there was considerable merit to the Pension Fund's argument in the 2-1 split decision.

There is no compelling reason to review this matter in that there is no important issue of public interest raised in DiGiacomo's petition.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is confined largely to setting forth the nature of the case in the proceedings below. Teamsters Pension Trust Fund of Philadelphia and Vicinity ("Pension Fund") does not disagree with that recitation. However, Petitioner's Statement of the Case fails to include numerous key facts that are material to the question presented.

DiGiacomo worked in Covered Employment from 1960 through 1971, earning either a full or half year benefit service credit in each of those years.

Between 1972 and 1977, DiGiacomo did not work in Covered Employment. Beginning in 1978, DiGiacomo once again worked in Covered Employment. DiGiacomo's benefit service credit earned for the years from 1960 through 1971 was forfeited by reason of the Break In Service provisions of the pension plan.

On February 4, 2000, DiGiacomo applied to the Pension Fund for a pension. On March 17, 2000, DiGiacomo's application was approved. DiGiacomo was credited with 16.78 years of contributory benefit service for his continuous Covered Employment for the period from 1979 to 1993. He was not credited with over ten years of benefit service from 1961 through 1971 because he was not in covered employment for a period of more than 156 consecutive calendar weeks, resulting in a break in service, per the terms of the plan prior to January 1, 1976.

DiGiacomo filed an appeal of the Administrator's calculation of benefit service credit to the Pension Plan's Board of Trustees, averring that he was entitled to benefit service credit earned prior to his break in service. After a hearing, the Trustees denied DiGiacomo's appeal, relying on the terms of the plan's pre-ERISA break-in-service provision.

DiGiacomo appealed the Trustees' decision to the American Arbitration Association. On October 17, 2001, an arbitration hearing was conducted. On November 1, 2001, the arbitrator denied DiGiacomo's appeal and upheld the Administrator's

determination that DiGiacomo's break in service canceled his vesting and benefit service for the period from 1960 to 1971.

On March 15, 2004, DiGiacomo filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking benefit service credit for the period from 1960 to 1971 that had been forfeited by application of the Plan's Break In Service Rules. The complaint averred that the Pension Fund violated ERISA § 202(b) and § 204(b)(1)(D) by applying the pre-ERISA break in service provisions of the plan. The Pension Fund filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 29, 2004, the District Court granted the Pension Fund's motion to dismiss, relying on the Third Circuit precedent of *Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 145 (3d Cir. 1985) and *Haas & Cass v. Boeing Co.*, 1992 WL 221335, *aff'd without op*, 993 F.2d 877 (3d Cir. 1993).

On August 24, 2005, the Third Circuit reversed and remanded the case to the District Court. In its decision, the court noted that the Second Circuit[1] and the Seventh Circuit had examined and analyzed the issue and reached contrary conclusions. *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220, 225 (3d Cir. 2005) *cert. denied*, ___ U.S. ____ (2006). The Third Circuit held, in a 2-1

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[1] *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151 (2d Cir. 2003); *Jones v. UOP*, 16 F.3d 141(7th Cir. 1994)

split decision[2], that for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break in service. The Pension Fund's Petition for Writ of Certiorari was denied on March 6, 2006. On October 19, 2005 Petitioner filed a motion for attorneys' fees. Respondent began to prepare a response to the motion on October 21, 2005 for the November 3, 2005 deadline. On November 2, 2005, Respondent received a notice that the Third Circuit requested a response to the motion by November 8, 2005. Respondent filed the response on November 8, 2005. On November 15, 2005, the Third Circuit denied DiGiacomo's Motion for Attorneys' Fees.

REASONS FOR DENYING THE WRIT

Under Rule 10 of this Court's Rules, a petition for Writ of Certiorari shall only be granted for compelling reasons. The variance in the circuits' interpretation of ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), do not rise to such a level to require this Court's review. The Petitioner admitted that most circuits, including the Third Circuit, have adopted a five-factor analysis for applying the Court's discretionary ability to award reasonable attorneys' fees and costs under ERISA Section 502(g)(1). The five factor analysis, first articulated in *Eaves v.*

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[2] In his dissenting opinion, Judge Alito, averred that § 204, 29 U.S.C. § 1054 does not give an unconditional right to receive benefits and that "under the minimum vesting standards in § 203, the Plan was plainly allowed to treat benefits accrued prior to 1972 as forfeitable upon a break in service". *DiGiacomo*, 420 F.3d 220, 228.

Penn, 587 F.2d 453 (10th Cir. 1978), does not prevent a prevailing plaintiff from receiving attorneys' fees and costs. It merely provides guidance for a court to determine whether to use its discretion to award attorneys' fees.

The petitioner seeks to have this Court adopt a minority view, that there should be a presumption of attorneys' fees for the prevailing party. Petitioner fails to address why Congress did not simply include such language in ERISA Section 502(g)(1), in light of the clear mandate for attorneys' fees and costs under ERISA Section 502(g)(2) to a prevailing plan.

Moreover, the analogy to civil rights statutes is flawed in that there is no "private attorney general" mandate contained in ERISA.

I. THERE IS NO INDICATION THAT CONGRESS INTENDED A PRESUMPTION TO GRANT ATTORNEYS' FEES TO THE PREVAILING PARTY

The Third Circuit declined to award the Petitioner Alfred DiGiacomo attorneys' fees and costs, exercising its discretion under ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1).

ERISA 29 U.S.C. § 1132(g)(1), states in pertinent part that:

> (1) In any action under this sub-chapter (other than an action described in Paragraph (2)) by a participant,

> beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

To determine Congress' intent, the Court examines the explicit statutory language and the structure and the purpose of the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). The plain language of the statute provides that the court in its discretion may grant either party reasonable attorneys' fees.

This can be compared to ERISA Section 502(g)(2), 29 U.S.C. § 1132(g)(2), for which an award of attorneys' fees and costs are mandatory in a case where the plan is enforcing 29 U.S.C. § 1145, collection of contributions.

A. The Private Attorney General Doctrine Does Not Apply to ERISA

The private attorney general doctrine permits a court to award attorneys' fees to a plaintiff who pursues public interest litigation which Congress makes a high priority. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The private attorney general doctrine has been invoked in civil rights cases where constitutional rights are at issue. The private attorney general doctrine is an exception to the American Rule.

The Fifth Circuit in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980) rejected the private attorney general doctrine in relation to cases filed under the ERISA statute.

> The policies underlying ERISA... do not raise to the level of assuring all citizens are accorded their civil rights... Plaintiffs suing under [civil rights] statutes are "private attorneys general" in the sense that they seek injunctive relief to vindicate important public rights. If such "plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." **Plaintiffs under Title I of ERISA may be seeking... simply the recovery of benefits from the plan that are due them alone**... Thus, incentives in the form of attorneys' fees are, on the whole, less necessary to insure that the statute is enforced.

Ellison v. Shenango Pension Board, 956 F.2d 1268, 1275 (3d Cir. 1992) *quoting Bowen*, 624 F.2d at 1265. (Emphasis added.)

ERISA protects a participant's economic interest, not a constitutional right or social mandate. ERISA was enacted for the protection of employees' pensions, but at the same time "strike an appropriate balance between the interests of

employers and labor organizations in maintaining flexibility in the design and operation of their pension programs. H.R.Rep. No. 93-533(1973) *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

Although ERISA is an important statute, it is not a law enforcing a constitutional right. In that ERISA does not invoke the private attorney general doctrine, the analogy to such provisions is weak. There is no important public or social issue to be decided and thus the Court should deny the petition in this matter.

II. The Third Circuit Applied the Five-Factor Analysis in DiGiacomo.

In *Ursic v. Bethlehem Mines*, 719 F. 2d 670, 673 (3d Cir. 1983) the Third Circuit adopted the five factors used in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), used in determining whether to issue an award of attorney's fees under 29 U.S.C. § 1132(g)(1). The five factors are:

1. The offending parties' culpability or bad faith;

2. The ability of the offending parties to satisfy an award of attorneys' fees;

3. The deterrent effect of an award of attorneys' fees against the offending parties;

4. The benefit conferred on members of the Pension Plan as a whole; and

5. The relative merits of the parties' position.

Ursic at 673.

In DiGiacomo, the court explicitedly stated that it follows *Ursic's* five factors as a guide to exercising its discretion. (Appendix 3a)

The Third Circuit in *DiGiacomo* did not limit its examination to the issue of bad faith, but looked also to the relative underlying merits of the parties' cases. The court held "that the Fund's legal position has significant merit." Although the Petitioner prevailed, the court stated that the issue involved was "close and difficult", with the Third Circuit issuing a 2-1 split decision. The procedural history of the case reflected that the Respondent prevailed in arbitration and at the district court level, where the district court followed the Third Circuit's precedent in *Tanzillo*, 769 F.2d 140, 145 (3d Cir. 1985) and *Haas*, 1992 WL 221335, *aff'd without op*, 993 F.2d 877 (3d Cir. 1993), granting the Pension Fund's motion to dismiss.

Although the Third Circuit did not explicitly address the other factors in its decision, it has previously held that the third factor, i.e., deterrent effect, would only be effective upon those with frivolous claims. "The deterrent effect will be beneficial upon those who contemplate speculative

and duplicative litigation on thinly based grounds." *Monkelis v. Mobay Chemical*, 827 F.2d 937 (3d Cir. 1987). In *Monkelis*, the plaintiff's claims were substantially without merit and were time barred. In *McPherson,* the Court explains that "it will further the objectives of ERISA if fees awarded to deter behavior that falls short of bad faith conduct." *McPherson v. Employees' Pension Plan of America Re-Insurance Co.*, 33 F.3d 253, 258 (3d Cir. 1994). The Court did not find any behavior "short of bad faith conduct" in this matter, as reflected by the statement that the issue in the case was a close and difficult one. If there were no bad faith and a meritorious argument, the Third Circuit would not find any deterrent effect in an award of attorneys' fees.

Other circuits have been inclined not to grant attorneys' fees where the fees were generated at the appellate level, where the unsuccessful party appealed and the issue has been "close and difficult". See *Cook v. Liberty Life Assurance Company of Boston*, 334 F.3d 122 (1st Cir. 2003). In *Cook*, attorneys' fees were denied prevailing participant where the administrator of a plan had appealed a decision reinstating the participant's long-term disability benefits. The court in *Cook* held that despite the fact that Liberty Life could afford to pay the attorneys' fees, and there may be a value for other participants in the clarification of standards an insurer must meet to terminate long-term disability benefits, those factors did not outweigh the lack of bad faith by Liberty Life and the plausible argument made on appeal. *Id* at 124. (In the

instant case, it was the participant who brought the appeal.)

A presumption of attorneys' fees and costs for the prevailing plaintiff in "close and difficult" cases, would put a chilling effect on litigation by benefit funds that have a fiduciary obligation to maintain the trust of a fund for all participants and beneficiaries. The Fund would have to make a decision for each benefit claim where there was a question of statutory interpretation of ERISA and weigh it against the cost bearing its own attorneys' fees *and* the plaintiff's attorneys' fees if they did not prevail.

By Congress giving the courts discretion, the courts are able to award attorneys' fees to those plaintiffs who could not bring an action otherwise, yet balance it with equitable considerations of the cases. The equitable review among the circuits in applying a court's discretion does not rise to a conflict that requires this Court's attention.

CONCLUSION

Based upon the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

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ALFRED DIGIACOMO,

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TEAMSTERS PENSION TRUST FUND
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

This Reply Brief is submitted in support of Alfred DiGiacomo's Petition For A Writ Of Certiorari to the United States Court of Appeals for the Third Circuit, in order to respond to the Brief in Opposition filed by Respondent Teamsters Pension Trust Fund Of Philadelphia And Vicinity (the "Fund").

In its Opposition Brief the Fund argues that (1) Congress did not intend to create a presumption to grant attorney's fees to "the prevailing party" in ERISA cases, and that (2) the Third Circuit did not deny fees solely because the issue was "close" and the Plan's defense was not frivolous, but applied the five-factor test adopted by most circuits. Those two arguments will be addressed below.

REASONS FOR GRANTING THE PETITION

I. CONGRESS INTENDED A PRESUMPTION IN FAVOR OF AWARDING FEES IN ERISA BENEFIT CASES

The Fund argues, first, that, if a presumption in favor of attorney's fees was intended, "Petitioner fails to address why Congress did not simply include such language in ERISA Section 502(g)(1), in light of the clear mandate for attorney's fees and coasts under ERISA Section 502(g)(2) to a prevailing party." At 6.[1] The difference between the parties and claims addressed by the two provisions explain the difference.

1. In fact, however, Section 502(g)(2) does *not* mandate the award of attorney's fees to "a prevailing party," only to a prevailing *plaintiff* who is a plan *fiduciary* enforcing an employer's *contribution requirements* of ERISA Section 514, 29 USC § 1145.

Section 502(g)(2) was adopted in 1980, thus six years after subsection (g)(1), was made applicable to only *one* specific action, a contribution enforcement action pursuant to ERISA Section 415, 29 USC § 1145, which was adopted at the same time as Section 502(g)(2); was limited to *one* type of plaintiff, a fiduciary in an action against *one* specific defendant, an employer, for relief in favor of *one* specific entity, a plan, on condition that the fiduciary prevail.[2] Indeed, as noted by this Court, quoting the Senate Committee on Labor and Human Resources, "the provision was added because 'simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions,' and steps must be taken to 'simplify delinquency collection.'" *Kaiser Steel v Mullins*, 455 US 72, 87, 102 SCt 851, 70 LEd2d 833 (1982). Given the specific and limited to purpose of the new collection provision, it made sense for Congress to make the award of fees *mandatory*.

By contrast, Section 502(g)(1), which was adopted in 1974, when ERISA was first enacted, applies to "any action under this subchapter", i.e., "Subchapter I - Protection Of Employee Benefit Rights"; provides standing to any participant, beneficiary or fiduciary; contains "no limit . . .

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2. Section 502(g)(2) provides in pertinent part:

> "In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan . . . (D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . ."

on the universe of possible defendants";[3] applies to a wide variety of legal and equitable relief; and permits the award of fees to either party regardless of prevailing-party status, i.e., fees can be awarded to a losing party.[4] In view of the broad scope of Section 502(g)(1), it was reasonable for Congress to make such awards discretionary, rather than mandatory as under Section 502(g)(2),

The fact, however, that a judge is vested with discretion to award attorney's fees to either party does not mean that such discretion is unlimited. Rather, the exercise of such broad discretion must be informed by the purpose of the provision. This Court has held that Section 502(g)(1) was adopted "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims." *Massachusetts Mutual v Russell*, 473 US 134, 147, 105 SCt 3085, 87 LEd2d 96 (1985). It follows from this goal that - at least in benefit claim cases - there must be a presumption in favor of the award of fees, otherwise a participant or beneficiary would be unable to find representation in a meritorious claim or, worse yet, be denied fees after winning a meritorious claim on the grounds that the issues was "close", as happened to DiGiacomo.

The Fund also argues that "Petitioner's statement that participants and beneficiaries have difficulty obtaining representation on a contingency fee basis, without the

3. *Harris Trust v Salomon Smith Barney*, 530 US 238, 246, 120 SCt. 2180, 147 LEd2d 187 (2000).

4. As adopted in 1974, Section 502(g) - later renumbered (g)(1) and amended - provided: "In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

presumption of attorneys' fees is pure speculation." At 1. In the very next sentence, however, the Fund concedes that "[t]he fact is that the pool of attorneys knowledgeable in ERISA is limited, with many representing ERISA funds or employers." *Id.* Given the limited pool of experienced ERISA attorneys, and the fact that "many" represent plan sponsors or funds, it clearly follows that few experienced ERISA attorneys are available to participants and beneficiaries to begin with, let alone on a contingency basis. Moreover, because most pension claim are quite small, the only "contingency" is an award of statutory fees under Section 502(g)(1), a contingency that is entirely based on the presumption that fees will be awarded in case of a successful outcome. Only an ostrich with its head firmly planted in the sand could deny that even fewer, if any, ERISA attorneys would be willing to provide representation in meritorious, but "difficult", i.e., "close", cases, if success in such a case would lead not to an enhanced fee, but to a denial of any statutory fee.

In DiGiacomo's case, as noted in the Petition, attorney's fees incurred so far in the district court and in the Third Circuit exceed $ 60,000, while the additional pension benefit recovered is $ 500 per month. DiGiacomo would have to give up 10 years of pension benefits to pay his attorney. On the other hand, if no award is made, his attorney, Doris J. Dabrowski, will have to think long and hard before taking any more ERISA cases on behalf of participants. Indeed, she could not afford the considerable time and costs required for this Petition, which is being done on a *pro bono* basis. Could Congress have intended to limit pensioners with meritorious claims to the charity of strangers?

The Third Circuit's fee denial in "close" cases is clearly incompatible with Congress' stated policy in adopting ERISA, namely to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing . . . ready access to the Federal courts." ERISA Section 2(b), 29 USC § 1001(b).

Finally, the Fund argues that while "[t]he private attorney general doctrine permits a court to award attorneys' fees to a plaintiff who pursues public interest litigation which Congress makes a high priority", at 7, "there is no 'private attorney general' mandate contained in ERISA". At 6. Quite apart from the fact that the doctrine is only relevant in the absence of a statutory grant of attorney's fees, in fact participants and beneficiaries have to function as private attorney generals by default. In fact, the Secretary of Labor limits its ERISA enforcement activities to violations of fiduciary duties, without enforcing any of ERISA's minimum standards, as evidenced in the Secretary's yearly Reports to Congress.[5]

Similarly, the Internal Revenue Services's primary mission is to rule on the "qualification" of pension plans for tax purposes, not to enforce participants' benefit rights, which must instead be enforced in private litigation. *See, e.g., Flynn v CIR*, 269 F3d 1064 (DCC 2001). As a consequence, inasmuch as ERISA preempts all State enforcement, the

5. The latest such Report available on line is "Employee Retirement Income Security Act 2000 Report to Congress", issued by the Pension and Welfare Benefits Administration of the U.S. Department of Labor. This Court can take judicial notice of the enforcement actions detailed in those reports and also, generally, of the litigation conducted by the Secretary and available on LEXIS and WESTLAW.

enforcement of ERISA's minimum standards is left to participants and beneficiaries who, therefore, are clearly "private attorneys general".[6] Given the burden placed on participants to enforce ERISA, as well as their rights to benefits, there must a presumption that participants and beneficiaries bringing successful ERISA actions will be entitled to fees.

II. THE THIRD CIRCUIT APPLIED ONLY ONE FACTOR IN DENYING FEES

In his Petition, DiGiacomo argued that, although the Third Circuit, like most other Circuits, has adopted a five-factor test to decide ERISA attorney's fee applications, in fact it was alone in holding that bad faith is a *sine qua non* for a fee award. At 6. He argued that "in order to qualify for fees, a beneficiary must prevail on an issue that is neither 'close' nor 'difficult', i.e., where a benefit denial is frivolous or close to frivolous," Petition, p. 12. The Third Circuit, therefore, requires the defense position to be in bad faith. In its Brief in Opposition the Fund argues that the *DiGiacomo* court "did not limit its examination to the issue of bad faith, but looked also to the relative merits of the parties' cases." At 10.

The Fund argues that, "[a]lthough the Third Circuit did not explicitly address the other factors in its decision, it has previously held that the third factor, i.e., deterrent effect,

6. By contrast to ERISA rights, civil rights are enforced at the local, State and Federal level, so that individual actions are generally directed at individual economic wrongs, undercutting the Fund's argument that the presumption in favor of attorney's fees in civil rights cases is due to the fact that those actions vindicate "constitutional rights", as opposed to "economic interests". At 1.

would only be effective upon those with frivolous claims", at 10, relying on *Monkelis v Mobay Chemical*, 827 F2d 935 (3rd Cir 1987). *Monkelis*, however, awarded fees to the defendant because plaintiff's claim was frivolous, and does not therefore support the denial of fees to a prevailing plaintiff. (If, however, *Monkelis* were applicable, then Factor 3 (deterrence) would support a fee award only in the case of a frivolous defense, as DiGiacomo argued).

With respect to Factor 1 ("the offending parties' culpability or bad faith"), "culpability" in a civil context includes "the breach of a legal duty", i.e., "something more than simple negligence". *McPherson v Employees' Pension Plan Of American Re-Insurance Company*, 33 F3d 253, 257 (3rd Cir 1994). A violation of ERISA's minimum standards clearly constituted a "breach of a legal duty" and, therefore, rendered the Fund "culpable". If "culpability" was not enough to support an award of fees, then nothing short of "bad faith" will.

With respect to Factor 5 ("the relative merits of the parties' position", the only factor it discussed), the Third Circuit held that the statutory issue involved was a "close and difficult one", and that the "divergence of opinion', which divided the Courts of Appeals and the panel itself, made it "clear to us that there was no culpability or bad faith on the part of the Fund in partially denying DiGiacomo's claim for accrued benefits."

Obviously the Third Circuit conflated Factors 1 and 5, holding that the closeness of a statutory issue negates both culpability and bad faith and, therefore, is in and of itself sufficient to deny fees. With all due respect, the Court's rationale stands ERISA on its head. As held by this Court in

Russell, *supra*, the purpose of ERISA's fee-shifting provision is to permit participants to enforce their benefit claims. There must be some certainty in the award of fees, because the few experienced ERISA attorneys who are willing to stake their compensation on the success of a benefit claim, are not willing to play Russian roulette in the fee application.

Even where, as here, a claim's success is based on statutory interpretation, courts may differ in evaluating its degree of "difficulty". Indeed, the Second Circuit, in interpreting the very same statutory provisions whose interpretation the Third Circuit found to be "close and difficult", held that plaintiff's claim was "grounded in text we find to be unambiguous." *McDonald v NYSA-ILA Pension Plan*, 320 F3d 151, 159 (2d Cir 2003). Indeed, it declared that the text was so clear as to render unnecessary resort to letters from the Department of Justice and Internal Revenue Service and Regulations from the Department of Treasury addressing the issue. *Id.*[7]

Winning an ERISA benefit case is hard enough, as evidenced by the countless unsuccessful plaintiffs whose bones litter the legal landscape. It should not be made even harder by denying them attorney's fees after they win an obviously meritorious case.

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7. Plaintiff in *McDonald* was awarded attorney's fees by the district court. 2002 WL 1974054 (SDNY, Aug 27, 2002).

CONCLUSION

The Third Circuit's apparent rationale for denying fees in "close and difficult cases" is that attorney's fees are intended to "punish" the defendant, rather than making it possible for ERISA participants and beneficiaries to vindicate their contractual right to the deferred portion of their compensation. There is absolutely no authority for this rationale in the statutory language, the legislative history or its stated policy. This Court should grant the Writ and clarify once and for all - thirty-two years after ERISA's adoption - the remedial purpose underlying Congress' adoption of a fee shifting provision in ERISA cases.

Respectfully submitted,

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